

# December 1995

## HONOR ROLL

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### 437th Session, Basic Law Enforcement Academy - Seattle - August 8 through October 27, 1995

President: Officer Kevin F. Wilma - Ellensburg Police Department  
Best Overall: Officer Ryan M. Long - Seattle Police Department  
Best Academic: Officer Ryan M. Long - Seattle Police Department  
Best Firearms: Officer Douglas L. Jorgensen - Seattle Police Department

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### Corrections Officer Academy - Class 219 - October 9 through November 3, 1995

Highest Overall: Officer Michael C. Bailey - Thurston County Jail  
Highest Academic: Officer Gregory Steven Chavez - Kitsap County Jail  
Highest Practical Test: Officer Michael C. Bailey - Thurston County Jail  
Officer Stephen L. Anderson - King County Div of Corrections  
Highest in Mock Scenes: Officer Susan L. Foland - Airway Heights Correctional Center  
Highest Defensive Tactics: Officer Darren A. Germunson - King County Div of Corrections

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### Corrections Officer Academy - Class 220 - October 9 through November 3, 1995

Highest Overall: Officer Juanita M. O'Neill - Skagit County Jail  
Highest Academic: Officer Michael J. Maude - King County Div of Corrections  
Highest Practical Testing: Officer Michael D. Lund - King County Div of Corrections  
Officer Juanita M. O'Neill - Skagit County Jail  
Officer Lawrence D. Reis - King County Div of Corrections  
Highest Mock Scenes: Officer Loren L. Hartman - Stevens County Jail  
Highest Defensive Tactics: Officer John L. Marckini - Airway Heights Correctional Center  
Officer Mauricea M. Parker - Airway Heights Correctional Center  
Officer Cheryl K. Sakahara - Washington State Penitentiary  
Officer Daniel L. Van Ogle - Airway Heights Correctional Center

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## **1995 SUBJECT MATTER INDEX**

**LED EDITOR'S NOTE:** This is our annual December LED subject-matter index. It covers all LED entries from January 1995 through December 1995. We have also published multi-year, cumulative subject matter indexes on two occasions. In 1989, we published a ten-year subject-matter index covering LED's from January 1979 through December 1988. In 1994, we published a five-year subject matter index covering LED's from January 1989 through December 1993. For each of the multi-year indexes, distribution was limited to one per agency due to the size of the index and attendant copying costs. However, the 1989 - 1993 cumulative index is accessible through the CJTC Computer Bulletin Board, as are our monthly LED's from January 1992 to date. See page 50 of 1994 - 1995 CJTC Training Catalog re Bulletin Board use.

### **ACCOMPLICE LIABILITY (Chapter 9A.08 RCW)**

"Mere presence" insufficient to support "joyriding" accomplice liability. State v. Luna, 71 Wn. App. 755 (Div. III, 1993) Feb. '95:15

### **APPEAL RIGHTS**

Defendant who fled state following his conviction waived his right to appeal. State v. Estrada, 78 Wn. App. 381 (Div. III, 1995) Dec. '95:18

### **ARREST, STOP & FRISK**

Citizen informant's tip justifies Terry stop of suspected drug dealer. State v. Garcia, 125 Wn.2d 239 (1994) Mar. '95:03

Terry stop -- including directive to unbelted passenger to step from car -- upheld; also, 1993 firearms law change survives "ex post facto" challenge. State v. Watkins, 76 Wn. App. 726 (Div. I, 1995) April '95:02

Fourth Amendment exclusionary rule doesn't require suppression of evidence gained in arrest based on computer record which was erroneous as result of court worker's error -- "good faith" rationale followed. Arizona v. Evans, 56 CrL 2175 (1995) May '95:03

"Single scoop" frisk rule rejected; harmless items subject to exclusion if removed from pocket with potential weapon detected in Terry patdown. State v. Fowler, 76 Wn. App. 168 (Div. III, 1994) May '95:14

For officer-safety reasons, officers may temporarily seize weapons during consent search even if scope of consent doesn't include weapons. State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) May '95:15

Violation of "misdemeanor presence" rule of RCW 10.31.100 would not constitute violation

of federal constitution's Fourth Amendment, and hence even if "police team" probable cause arrest not authorized under that state statute, this would not support federal civil rights lawsuit. Torrey v. Tukwila, 76 Wn. App. 32 (Div. I, 1995) May '95:19

No "destruction of evidence" exception to scope limits on Terry frisk; but PC to arrest was present, and search was reasonably contemporaneous with arrest, so evidence admissible under "incident to arrest" exception. State v. Rodriguez-Torres, 77 Wn. App. 687 (Div. I, 1995) Sept. '95:15

Division III panel considers subjective beliefs of officer regarding personal safety risks relevant in testing lawfulness of protective frisk. State v. Courtier, 78 Wn. App. 239 (Div. III, 1995) Oct. '95:04

No pretext problem with officer's stop, inquiry of traffic violator -- officer was following "normal practices and procedures" under Chapin rule. State v. Blumenthal, 78 Wn. App. 82 (Div. I, 1995) Nov. '95:13

### **ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)**

Intent to assault one person constitutes intent to assault all persons under RCW 9A.36.011; restrictive "transferred intent" ruling is reversed. State v. Wilson, 125 Wn.2d 212 (1994) Feb. '95:07

No right for citizen to use force to resist merely unlawful arrest. State v. Valentine, 75 Wn. App. 611 (Div. III, 1994) Sept. '95:14

Assault 2 -- beer glass deadly weapon under attendant circumstances. State v. Shilling, 77 Wn. App. 166 (Div. I, 1995) Oct. '95:12

Evidence of "intent to inflict" relating to assault on officer during escape attempt supports conviction for assault in the first degree. State v. Anderson, 72 Wn. App. 453 (Div. I, 1994) Oct. '95:12

Fear of harm which follows an attack may be an element of "assault". State v. Ratliff, 77 Wn. App. 522 (Div. I, 1995) Oct. '95:10

No justification for coyote-keeper's assault on wildlife officers even though they may have unlawfully entered his yard -- conviction upheld. State v. Mierz, 127 Wn.2d 460 (1995) Nov. '95:06

### **ASSISTING SUICIDE ATTEMPT (Chapter 9A.36 RCW)**

Statute prohibiting promotion of suicide attempts held constitutional. Compassion In Dying v. State of Washington, 49 F.3d 586 (9th Cir. 1995) Sept. '95:05

### **ATTEMPT**

Overt act requirement not met in case for attempted cocaine possession. State v. Grundy, 76 Wn. App. 335 (Div. III, 1994) June '95:16

## ATTORNEYS AND UNLAWFUL PRACTICE OF LAW

"Unlawful practice of law" statute upheld, explained. State v. Hunt, 75 Wn. App. 795 (Div. II, 1994) Oct. '95:14

## BURGLARY (Chapter 9A.52 RCW)

Burglary -- fenced area for park's donkey held to be "building". State v. Gans, 76 Wn. App. 445 (Div. I, 1994) Aug. '95:17

No burglary in evidence locker theft attempt -- locker not "building". State v. Deitchler, 75 Wn. App. 134 (Div. II, 1994) Nov. '95:19

## CIVIL LIABILITY

Violation of "misdemeanor presence" rule of RCW 10.31.100 would not constitute violation of federal constitution's Fourth Amendment, and hence even if "police team" probable cause arrest not authorized under that state statute, this would not support federal civil rights lawsuit. Torrey v. Tukwila, 76 Wn. App. 32 (Div. I, 1995) May '95:19

"Failure to protect" civil liability case must go to jury. Noakes v. Seattle, 77 Wn. App. 694 (Div. I, 1995) Oct. '95:21

"Good guy - bad guy" interrogation method doesn't support civil lawsuit for "outrage" or "negligent infliction of emotional distress". Keates v. Vancouver, 73 Wn. App. 257 (Div. II, 1994) Nov. '95:18

## COMMERCE CLAUSE

Federal statute banning guns near schools violates commerce clause. U.S. v. Lopez, 131 L. Ed.2d 626 (1995) Sept. '95:04

## COMPUTER BULLETIN BOARD

NOTE: Three years of LED's are available on WSCJTC computer bulletin board. Jan. '95:21

NOTE: 1989 - 1993 LED subject matter index on CJTC computer bulletin board. April '95:21

## CONSPIRACY

Undercover agent is not another person for purposes of conspiracy statute's agreement element; bilateral criminal agreement required. State v. Pacheco, 125 Wn.2d 150 (1994) Feb. '95:07

## CORPUS DELICTI RULE

Corpus delicti of attempted murder established, so statement admissible. State v. Vangerpen, 125 Wn.2d 782 (1995) May '95:07

Unlawful firearm possession: corpus delicti rule like that for DUI; state required to and did produce evidence that defendant had gun. State v. Wright, 76 Wn. App. 811 (Div. I, 1995) Aug. '95:21

## **DOMESTIC VIOLENCE**

Superior court directive that domestic violence arrestees be detained without bail until their first appearance in court is held lawful. Westerman v. Cary, 125 Wn.2d 277 (1994) March '95:06

## **DOUBLE JEOPARDY**

State constitution's double jeopardy clause no broader than federal constitution's clause -- test is whether crimes contain same elements. State v. Gocken, 127 Wn.2d 95 (1995) Oct. '95:03

NOTE: No double jeopardy in DUI prosecution and civil license suspension. Nov. '95:20

## **DUE PROCESS**

DOL may rely on statutory change-of-address requirements in mailing notice of driver's license revocation; due process challenge fails. State v. Rogers, 127 Wn.2d 270 (1995) Nov. '95:09

## **ELECTRONIC SURVEILLANCE AND MONITORING (Chapter 9.73 RCW)**

Street drug vendors get no privacy under electronic recording law (9.73). State v. D.J.W. (and nine others), 76 Wn. App. 135 (Div. I, 1994) Jan. '95:02

Supervisor's authorization for RCW 9.73.230 single-party consent recording of drug-deal conversations must specify which officers will record; several other RCW 9.73.230 issues resolved favorably to the State. State v. Jimenez, 76 Wn. App. 647 (Div. I, 1995) June '95:18

Defendant loses Miranda challenge and 9.73 challenge to admission of tape recordings of police barricade negotiations over the telephone. State v. Pejsa, 75 Wn. App. 139 (Div. II, 1994) Dec. '95:18

## **ENTRAPMENT**

Informant's persistence in effort to buy drugs not entrapment. State v. Trujillo, Chrisostomo, 75 Wn. App. 523 (Div. I, 1994) April '95:13

## **EQUAL PROTECTION**

Firearms law's restriction on aliens survives constitutional attack. State v. Hernandez-Mercado, 124 Wn.2d 368 (1994) Feb. '95:10

## ESCAPE (Chapter 9A.76 RCW)

Leaving residence without permission while serving home detention sentence is escape even if person continues to wear monitoring device. State v. Parker, 76 Wn. App. 747 (Div. III, 1995) Aug. '95:22

## EVIDENCE

DNA evidence created by PCR technique generally admissible; also, Miranda exclusionary rule gets pro-state reading parallel to federal rule. State v. Russell, 125 Wn.2d 24 (1994) Feb. '95:08

Expert testimony re -- (1) gamma marker testing of blood and (2) PCR/DNA typing -- for ID purposes held admissible in capital murder prosecution. State v. Gentry, 125 Wn.2d 570 (1995) March '95:06

Child's statements to social worker admissible under hearsay exception for "statements made for medical diagnosis and treatment". State v. Florczak, 76 Wn. App. 55 (Div. I, 1994) March '95:17

Four-year-old's statement to sex abuse therapist admissible under ER 803(a)(4)'s hearsay exception for statements made for medical diagnosis and treatment. Dependency of M.P., 76 Wn. App. 87 (Div. I, 1994) March '95:18

Child witness competent, child sex abuse hearsay admissible. State v. Pham, 75 Wn. App. 626 (Div. III, 1994) March '95:19

Child sex abuse hearsay law allows hearsay even if child testifies. State v. Bedker, 74 Wn. App. 87 (Div. I, 1994) March '95:21

"Smith affidavit" qualifies as a "prior inconsistent statement" under the hearsay rule exception at Evidence Rule (ER) 801(d)(1)(i). State v. Nelson, 74 Wn. App. 380 (Div. I, 1994) May '95:21

"Other offenses" evidence admissible if offenses very similar to the one at trial: "Common scheme or plan" provision of ER 404(b) construed. State v. Lough, 125 Wn.2d 847 (1995) June '95:06

Priest-penitent privilege of RCW 5.60.060(3) gets narrowing construction. State v. Buss, 76 Wn. App. 780 (Div. I, 1995) Aug. '95:22

Expert ok in testifying generally about heroin users, dealers, environment. State v. Cruz, 77 Wn. App. 811 (Div. I, 1995) Oct. '95:08

Officer's opinion that defendant "was the one running the show" was ok, not impermissible opinion as to defendant's guilt as an accomplice. State v. Fisher, 74 Wn. App. 804 (Div. I, 1994) Oct. '95:08

Hearsay, constructive possession issues resolved against defendant in drug case where officer executing search warrant answered the phone. State v. Collins, 76 Wn. App. 496

(Div. I, 1995) Oct. '95:17

Medical records admitted under "business records" hearsay exception. State v. Garrett, 76 Wn. App. 719 (Div. I, 1995) Oct. '95:20

## **EX POST FACTO DOCTRINE**

Terry stop -- including directive to unbelted passenger to step from car -- upheld; also, 1993 firearms law change survives "ex post facto" challenge. State v. Watkins, 76 Wn. App. 726 (Div. I, 1995) April '95:02

## **FALSE IMPERSONATION (Chapter 9A.60 RCW)**

Using false ID to return merchandise, alone, not "false impersonation". Seattle v. Schurr, 76 Wn. App. 82 (Div. I, 1994) April '95:15

## **FIREARMS**

Firearms law's restriction on aliens survives constitutional attack. State v. Hernandez-Mercado, 124 Wn.2d 368 (1994) Feb. '95:10

Terry stop -- including directive to unbelted passenger to step from car -- upheld; also, 1993 firearms law change survives "ex post facto" challenge. State v. Watkins, 76 Wn. App. 726 (Div. I, 1995) April '95:02

Federal firearms law provisions on restoration of firearms rights construed as automatically restoring rights upon discharge from conviction unless discharge order expressly declares that firearms possession prohibited; related Washington state statute subject to contrary interpretation. U.S. v. Herron, 45 F.3d 340 (9th Cir. 1995) June '95:05

Unlawful firearm possession: corpus delicti rule like that for DUI; State required to and did produce evidence that defendant had gun. State v. Wright, 76 Wn. App. 811 (Div. I, 1995) Aug. '95:21

Federal statute banning guns near schools violates commerce clause. U.S. v. Lopez, 131 L. Ed.2d 626 (1995) Sept. '95:04

## **FORFEITURE**

No double jeopardy where uncontested forfeiture action for criminal activity is followed by criminal prosecution arising from same activity. U.S. v. Cretacci, 62 F.3d 307 (9th Cir. 1995) Nov. '95:03

## **IMPLIED CONSENT, BREATH, AND BLOOD TESTS FOR ALCOHOL CONTENT**

NOTE: "Administrative per se" license revocation for DUI -- update. Feb. '95:20

Violation at jail of DUI arrestee's right to independent test requires dismissal -- jailers should have explained right to 2nd test. State v. McNichols, 76 Wn. App. 283 (Div. III, 1994) March '95:13

DUI arrestee's refusal of BAC test final -- no reconsideration allowed. DOL v. Lax, 125 Wn.2d 818 (1995) May '95:04

Offering blood test to DUI suspect being treated post-accident at hospital not justified under implied consent law unless no breath machine available at that particular hospital. Shelden v. DOL, 68 Wn. App. 681 (Div. II, 1993) May '95:19

Implied consent warnings need not go beyond the warnings expressly required by statute; under 1994 law, there was no need to warn of new administrative consequences or of new DUI penalty enhancements. State v. Bostrom, et. al., 127 Wn.2d 580 (1995) Nov. '95:03

ARTICLE: 1995 changes to DUI and implied consent laws. By James Schmid, Assistant Attorney General. Nov. '95:04

NOTE: No double jeopardy in DUI prosecution and civil license suspension. Nov. '95:20

## **INTERROGATIONS AND CONFESSIONS**

DNA evidence created by PCR technique generally admissible; also, Miranda exclusionary rule gets pro-state reading parallel to federal rule. State v. Russell, 125 Wn.2d 24 (1994) Feb. '95:08

No Miranda warnings required before questioning convicted defendant participating in sex offender treatment program as part of his sentence. State v. Warner, 125 Wn.2d 876 (1995) May '95:08

Questioning by officers following fatal MV accident not "custodial" for Miranda purposes; free-to-leave, probable cause tests rejected. State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May '95:10

Where Miranda violation results in both testimonial response and voluntary production of physical evidence, only testimonial element of response is required to be suppressed; Wethered precedent followed. State v. Lozano, 76 Wn. App. 116 (Div. III, 1994) May '95:15

No anticipatory, non-custodial invocation of Miranda rights under "initiation of contact" rule; also, no "focus" trigger to Miranda. State v. Warness, 77 Wn. App. 636 (Div. I, 1995) Sept. '95:06

No "cat out of the bag" rule under Miranda. State v. Baruso, 72 Wn. App. 603 (Div. I, 1993) Sept. '95:11

"Good guy - bad guy" interrogation method doesn't support civil lawsuit for "outrage" or "negligent infliction of emotional distress". Keates v. Vancouver, 73 Wn. App. 257 (Div. II, 1994) Nov. '95:18

Defendant loses Miranda challenge and 9.73 challenge to admission of tape recordings of police barricade negotiations over the telephone. State v. Pejsa, 75 Wn. App. 139 (Div. II, 1994) Dec. '95:18



## JUVENILE LAW

Infancy defense: Court addresses proof of knowledge that act "wrong". State v. Linares, State v. Pam, 75 Wn. App. 404 (Div. I, 1994) Sept. '95:16

Under former law, juvenile offense adjudication as "felony with sexual motivation" didn't require that juvenile register as sex offender. State v. S.M.H., 76 Wn. App. 550 (Div. I, 1995) Oct. '95:10

Juvenile sex offenders must register, continue to do so, after adulthood. State v. Acheson, 75 Wn. App. 51 (Div. II, 1994) Nov. '95:19

## LEGISLATION (NEW)

Washington Legislation -- 1995 -- Part One, June: 2-5; Part Two, July: 2-23 (Includes "The Becca Bill," Domestic Violence Amendments; and Implied Consent and DUI changes); Part Three, August: 3-11; Index of June, July, August Legislative Entries, Sept. '95:19-20

## LIMITATIONS STATUTE (RCW 9A.04.080)

Statute of limitations of RCW 9A.04.080(1)(g) on continuing "common scheme or plan" crime begins to run only upon completion of crime. State v. Reid, 74 Wn. App. 281 (Div. III, 1994) Aug. '95:21

## LOSS, DESTRUCTION, OR FAILURE TO PRESERVE EVIDENCE

Brady rule requiring prosecution to disclose evidence favorable to defendant construed in favor of defense in capital murder case. Kyles v. Whitley, 131 L.Ed.2d 490 (1995) Sept. '95:04

## MURDER AND OTHER CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Victim of assault can't be "participant" under felony-murder rule. State v. Goodrich, 72 Wn. App. 71 (Div. I, 1993) Aug. '95:23

Statute prohibiting promotion of suicide attempts held constitutional. Compassion In Dying v. State of Washington, 49 F.3rd 586 (9th Cir. 1995) Sept. '95:05

## NECESSITY DEFENSE

Common law "medical necessity" defense addressed in marijuana grow case. State v. Cole, 74 Wn. App. 571 (Div. II, 1994) April '95:20

"Necessity" can be defense for felon possessing gun, but not if possession begins before necessity arises and continues until need arises. State v. Jeffrey, 77 Wn. App. 222 (Div. III, 1995) Oct. '95:06

"Felony eluding" doesn't include "intent"; also, "necessity" no defense. State v. Gallegos, 73 Wn. App. 644 (Div. I, 1994) Oct. '95:18

## PLEA BARGAINING

Police lack independent authority to make agreement not to prosecute. State v. Reed, 75 Wn. App. 742 (Div. I, 1994) March '95:17

## PUBLIC RECORDS, ACCESS TO COURT RECORDS, AND PROCEEDINGS

Officer's state of mind irrelevant to search issue where presence in curtilage lawful; also, PUD employee's information disclosure ok. State v. Maxfield, 125 Wn.2d 378 (1994) Feb. '95:02

Ruse to get resident to open door lawful -- reasonable suspicion not required; also, RCW 42.17.314 not applicable to non-government utilities. State v. Weller, 76 Wn. App. 165 (Div. III, 1994) April '95:11

No constitutional error in excluding public from CrR 3.5 hearing. State v. Boneclub, 76 Wn. App. 872 (Div. I, 1995) Aug. '95:22

## RAPE AND OTHER SEX OFFENSES (Chapter 9A.44 RCW)

"Mental incapacity" under rape statute means lack of meaningful understanding of nature or consequences of sexual intercourse. State v. Ortega-Martinez, 124 Wn.2d 702 (1994) March '95:04

Locked bedroom in single-family house not a separate unit of "building" for purposes of first degree rape law, so no "felonious entry" proven. State v. Thomson, 71 Wn. App. 634 (Div. II, 1993) June '95:20

Child molesting statute's "intimate parts," "purpose of sexual gratification" elements addressed in touch-through-clothing case. State v. Veliz, 76 Wn. App. 775 (Div. III, 1995) Aug. '95:20

Rape One: mere presence of gun not "use" or "threat to use" gun. State v. Bright, 77 Wn. App. 304 (Div. III, 1995) Sept. '95:18

State need not always present expert testimony to prove that a rape 2 victim lacked mental capacity to consent to sexual intercourse. State v. Summers, 70 Wn. App. 424 (Div. I, 1993) Oct. '95:20

## RESTITUTION

Restitution must be ordered by court within 60 days of sentencing. State v. Krall, 125 Wn.2d 146 (1994) Feb. '95:10

Insurance company entitled to restitution from juvenile offender. State v. Sanchez, 73 Wn. App. 486 (Div. III, 1994) Oct. '95:15

Restitution for lost wages only if loss due to victim's physical injury. State v. Hefa, 73 Wn. App. 865 (Div. I, 1994) Oct. '95:15

## SEARCH AND SEIZURE

### Administrative Search Warrants

Challenge to City of Seattle's residential housing inspection program raises consent search, administrative search warrant issues. Seattle v. McReady, 124 Wn.2d 300 (1994) Feb. '95:09

### Anticipatory Search Warrants

Probable cause lacking; anticipatory warrant question discussed. State v. Gonzalez, 77 Wn. App. 479 (Div. III, 1995) Aug. '95:16

### Commissioners Issuing Search Warrants

Superior Court Commissioners have authority to issue search warrants. State v. Goss, 78 Wn. App. 58 (Div. II, 1995) Nov. '95:18

### Computer Searches

NOTE: Federal agencies develop guidelines on searching, seizing computers. April '95:12

### Consent Search Exception To Warrant Requirement

Challenge to City of Seattle's residential housing inspection program raises consent search, administrative search warrant issues. Seattle v. McReady, 124 Wn.2d 300 (1994) Feb. '95:09

Landlord's consent to search invalid; also, State's claim of "open view" with flashlight fails; and no PC on statement about MJ. State v. Rose, 75 Wn. App. 28 (Div. I, 1994) March '95:07

For officer-safety reasons, officers may temporarily seize weapons during consent search even if scope of consent doesn't include weapons. State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) May '95:15

### Entry Of Private Premises To Arrest

Warrantless look into toilet stall ok if PC to: (1) arrest & (2) believe suspect inside; also, inevitable discovery rule supports evidence admission. State v. White, 76 Wn. App. 801 (Div. I, 1995) June '95:09

No "automatic standing" under either state or federal constitution to request exclusionary rule remedy for unlawful search or seizure. State v. Carter, 74 Wn. App. 320 (Div. I, 1994) June '95:17

### Exclusionary Rule

No "automatic standing" under either state or federal constitution to request exclusionary rule remedy for unlawful search or seizure. State v. Carter, 74 Wn. App. 320 (Div. I, 1994) June '95:17

No justification for coyote-keeper's assault on wildlife officers even though they may have unlawfully entered his yard -- conviction upheld. State v. Mierz, 127 Wn.2d 460 (1995) Nov. '95:06

#### Exigent Circumstances (And Emergencies)

Emergency justifies warrantless entry in DV circumstances. State v. Menz, 75 Wn. App. 351 (Div. II, 1994) Feb. '95:17

#### Identity Of CI (Disclosing, Protecting)

Court dismisses drug charge based on state's refusal to identify CI. State v. Petrina, 73 Wn. App. 779 (Div. II, 1994) Oct. '95:16

#### Incident To Arrest (Non-vehicle Search)

No "destruction of evidence" exception to scope limits on Terry frisk; but PC to arrest was present, and search was reasonably contemporaneous with arrest, so evidence admissible under "incident to arrest" exception. State v. Rodriguez-Torres, 77 Wn. App. 687 (Div. I, 1995) Sept. '95:15

#### Incident To Arrest (Vehicle Search)

Truck's accessible living area is subject to search incident to arrest. State v. Johnson, 77 Wn. App. 441 (Div. II, 1995) Aug. '95:12

#### Jail Inventory, Property Box

Routine booking inventory search at jail following arrest upheld. State v. Smith (Ethel Mae), 76 Wn. App. 9 (Div. I, 1994) May '95:17

#### Knock And Announce

Knock-and-announce requirement is part of the Fourth Amendment. Wilson v. Arkansas, 131 L. Ed.2d 976 (1995) Sept. '95:03

#### Particularity Requirement

Search of visitor's vehicle under "any vehicles on the property" provision of warrant fails Fourth Amendment probable cause/particularity test. State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95:05

"All persons present" warrant fails PC particularity requirement. State v. Carter, 79 Wn. App. 154 (Div. II, 1995) Nov. '95:10

Pickup truck camper search under warrant unlawful -- affidavit fails to make probable

cause connection to truck; also, truck not in curtilage. State v. Graham, 78 Wn. App. 44 (Div. II, 1995) Nov. '95:15

### Privacy Expectations; Scope Of Constitutional Protection

Entry of partially shielded yard of home unlawfully invades "curtilage". State v. Hoke, 72 Wn. App. 869 (Div. I, 1994) Jan. '95:06

No privacy or curtilage violation in officers' approach of home. State v. Chaussee, 72 Wn. App. 704 (Div. III, 1994) Jan. '95:09

"Independent grounds" ruling under state constitution, article 1, section 7 -- rural barn owner had reasonable privacy expectation. State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) Jan. '95:19

Officer's state of mind irrelevant to search issue where presence in curtilage lawful; also, PUD employee's information disclosure ok. State v. Maxfield, 125 Wn.2d 378 (1994) Feb. '95:02

Landlord's consent to search invalid; also, State's claim of "open view" with flashlight fails; and no PC on statement about MJ. State v. Rose, 75 Wn. App. 28 (Div. I, 1994) March '95:07

Ruse to get resident to open door lawful without prior reasonable suspicion; also, RCW 42.17.314 not applicable to non-governmental utilities. State v. Weller, 76 Wn. App. 165 (Div. III, 1994) April '95:11

Warrantless look into toilet stall ok if PC to: (1) arrest & (2) believe suspect inside; also, inevitable discovery rule supports evidence admission. State v. White, 76 Wn. App. 801 (Div. I, 1995) June '95:09

No privacy for rural homeowner based on neighbors' "no trespassing" signs; more than signs generally needed to create privacy protection. State v. Gave, 77 Wn. App. 333 (Div. II, 1995) Aug. '95:14

Random urine testing of K-12 student athletes ok under Fourth Amendment. Vernonia School District 47J v. Acton, 63 LW 4653 (1994) Sept. '95:03

### Probable Cause To Search

PC established to search for murder weapon in suspect's premises. State v. Condon, 72 Wn. App. 638 (Div. I, 1993) Jan. '95:12

Fact of sale of 1/8 ounce of coke at residence not PC to search it for more drugs. State v. Sanchez, 74 Wn. App. 763 (Div. III, 1994) Jan. '95:15

Warrant affidavit's description of reliability of detective's sense of smell sufficient; no reckless misstatement made regarding power consumption. State v. Olson, 74 Wn. App. 126 (Div. I, 1994) Jan. '95:17

Terry/Summers question, K9-based PC issue addressed -- State prevails. State v. Flores-Moreno, 72 Wn. App. 733 (Div. II, 1994) Feb. '95:10

Fact that drugs were discovered at Seattle post office en route to Alaska address is not probable cause to search addressee's Winlock residence. State v. Dalton, 73 Wn. App. 132 (Div. II, 1994) Feb. '95:13

Landlord's consent to search invalid; also, State's claim of "open view" with flashlight fails; and no PC on statement about MJ. State v. Rose, 75 Wn. App. 28 (Div. I, 1994) March '95:07

Probable cause (PC) that person is growing marijuana in a house at another location is not necessarily PC to search residence. State v. Olson, 73 Wn. App. 348 (Div. II, 1994) March '95:15

Search warrant affidavit describing citizen's observance of marijuana grow establishes basis of information under Aguilar-Spinelli PC rule. State v. Creelman, 75 Wn. App. 490 (Div. I, 1994) April '95:08

Probable cause lacking; anticipatory warrant question discussed. State v. Gonzalez, 77 Wn. App. 479 (Div. III, 1995) Aug. '95:16

PC to arrest, search MV for rape evidence established; also, claim of deliberate or reckless omission from warrant affidavit not proven. State v. Herzog, 73 Wn. App. 34 (Div. II, 1994) Sept. '95:07

PC nexus established to search marijuana grower's permanent residence. State v. O'Neill, 74 Wn. App. 820 (Div. I, 1994) Sept. '95:17

K-9 sniff of vehicle and other evidence establishes probable cause justifying seizure and forfeiture of vehicle under RCW 69.50.505. Adams County v. 1978 Blue Ford Bronco, 74 Wn. App. 702 (Div. III, 1994) Oct. '95:16

Pickup truck camper search under warrant unlawful -- affidavit fails to make probable cause connection to truck; also, truck not in curtilage. State v. Graham, 78 Wn. App. 44 (Div. II, 1995) Nov. '95:15

#### Reckless, Purposeful Omissions From Affidavit

No "reckless omission" from warrant affidavit in officer-affiant's failure to note CI's drug addiction, criminal record, grudge against suspect, and relationship to suspect; also, "intent to deliver" evidence sufficient. State v. Taylor, 74 Wn. App. 111 (Div. I, 1994) May '95:18

PC to arrest, search MV for rape evidence established; also, claim of deliberate or reckless omission from warrant affidavit not proven. State v. Herzog, 73 Wn. App. 34 (Div. II, 1994) Sept. '95:07

#### Scope Of Search Authorization Under Warrant

Search of visitor's vehicle under "any vehicles on the property" provision of warrant fails Fourth Amendment probable cause/particularity test. State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95:05

Pickup truck camper search under warrant unlawful -- affidavit fails to make probable cause connection to truck; also, truck not in curtilage. State v. Graham, 78 Wn. App. 44 (Div. II, 1995) Nov. '95:15

### Strip Searches

Removal of tube protruding from drug arrestee's anus is lawful "strip search" under Chapter 10.79 RCW, not unlawful "body cavity" search. State v. Jones, 76 Wn. App. 592 (Div. I, 1995) June '95:12

Strip search statute's provision for "reasonable suspicion" jail intake searches on written authorization survives constitutional attack. State v. Audley, 77 Wn. App. 897 (Div. I, 1995) Sept. '95:11

### **SENTENCING (See also "Restitution")**

Revocation of deferred prosecution on DUI No. 1 mandatory automatically upon conviction of DUI No. 2, even if appeal has been filed on DUI No. 2. State v. Kuhn, 74 Wn. App. 787 (Div. II, 1994) Sept. '95:12

Lack of prior police contacts not a mitigating factor for SRA sentencing. State v. Freitag, 127 Wn.2d 141 (1995) Oct. '95:04

UCSA "school zone" law applies even if school is located on third floor of urban building, and therefore has no playground or landscaping. State v. Shannon, 77 Wn. App. 379 (Div. I, 1995) Oct. '95:10

### **SEPARATION OF POWERS**

Coroner's inquest statute and implementing King County order upheld. Carrick v. Locke, 125 Wn.2d 129 (1994) Feb. '95:10

### **SEX OFFENDER REGISTRATION**

Juvenile sex offenders must register, continue to do so after adulthood. State v. Acheson, 75 Wn. App. 51 (Div. II, 1994) Nov. '95:19

Under former statute, juvenile offense adjudication as "felony with sexual motivation" didn't require that juvenile register as sex offender. State v. S.M.H., 76 Wn. App. 550 (Div. I, 1995) Oct. '95:10

### **SEX PREDATOR LAW**

Sexual predator law ruled unconstitutional; State appeals. Young v. Weston, Case No. C94-480C. Oct. '95:22

## **THEFT AND RELATED OFFENSES (Chapter 9A.56 RCW)**

"Mere presence" insufficient to support "joyriding" accomplice liability. State v. Luna, 71 Wn. App. 755 (Div. III, 1993) Feb. '95:15

"Market value" in theft case established by non-negotiable prices set by victimized store, even though neighboring store's prices were set lower. State v. Kleist, 74 Wn. App. 429 (Div. III, 1994) April '95:17

"Market value" under "theft" statute established by tags on stolen clothing setting non-negotiable prices, plus foundation testimony. State v. Rainwater, 75 Wn. App. 256 (Div. I, 1994) April '95:19

"Market value" for proof of degree of retail theft addressed. State v. Kleist, 126 Wn.2d 432 (1995) Sept. '95:05

## **TRAFFIC**

NOTE: "Administrative per se" license revocation for DUI -- update. Feb. '95:20

Evidence law in traffic cases -- radar results admissibility explained. Bellevue v. Lightfoot, 75 Wn. App. 214 (Div. I, 1994) April '95:20

No crime if traffic violator won't promise to respond per citation form. Port Orchard v. Tilton, 77 Wn. App. 178 (Div. II, 1995) June '95:07

Vehicular homicide based on driver's DUI status doesn't require proof that intoxication caused victim's death; only operator-cause need to be proven. State v. Rivas, 126 Wn.2d 443 (1995) Aug. '95:12

Rivas's interpretation of vehicular homicide statute applied. State v. Salas, 127 Wn.2d 173 (1995) Oct. '95:04

"Felony eluding" doesn't include "intent"; also, "necessity" no defense. State v. Gallegos, 73 Wn. App. 644 (Div. I, 1994) Oct. '95:18

DOL may rely on statutory change-of-address requirements in mailing notice of driver's license revocation; due process challenge fails. State v. Rogers, 127 Wn.2d 270 (1995) Nov. '95:09

## **UNIFORM CONTROLLED SUBSTANCES ACT AND OTHER DRUG LAWS (Title 69 RCW)**

Real property forfeiture provisions of RCW 69.50.505 require full adversarial hearing "within 90 days: but trigger date unclear. Tellevik et. al. v. Real Property Known As 31641 West Rutherford Street et. al., 125 Wn.2d 464 (1994) (Tellevik II) Feb. '95:06

Accomplice sentences enhanced per UCSA's drug free zone provision. State v. Silva-Baltazar, 125 Wn.2d 472 (1994) March '95:06



No "reckless omission" from warrant affidavit in officer-affiant's failure to note CI's drug addiction, criminal record, grudge against suspect, and relationship to suspect; also, "intent to deliver" evidence sufficient. State v. Taylor, 74 Wn. App. 111 (Div. I, 1994) May '95:18

"Unwitting possession" of illegal drugs established by defendant. State v. Hundley, 72 Wn. App. 746 (Div. II, 1994) May '95:20

Overt act requirement not met in case for attempted cocaine possession. State v. Grundy, 76 Wn. App. 335 (Div. III, 1994) June '95:16

Purchaser of cocaine not guilty of UCSA "delivery". State v. Morris, 77 Wn. App. 948 (Div. II, 1995) Sept. '95:14

UCSA "school zone" law applies even if school is located on third floor of urban building, and therefore has no playground or landscaping. State v. Shannon, 77 Wn. App. 379 (Div. I, 1995) Oct. '95:10

K-9 sniff of vehicle, together with other evidence establishes probable cause justifying seizure and forfeiture of vehicle under RCW 69.50.505. Adams County v. 1978 Blue Ford Bronco, 74 Wn. App. 702 (Div. III, 1994) Oct. '95:16

Hearsay, constructive possession issues resolved against defendant in drug case where officer executing search warrant answered the phone. State v. Collins, 76 Wn. App. 496 (Div. I, 1995) Oct. '95:17

No inherent judicial authority to order forfeiture of derivative contraband. State v. Alaway, 64 Wn. App. 796 (Div. II, 1992) Oct. '95:20

## **WILDLIFE PROTECTION**

Division Three disagrees with Division Two and rules that killing deer with two antlers in three-antler area is violation of RCW 77.21.010(2), not violation of RCW 77.16.020(1); also, "necessity" defense rejected. State v. Bailey, 77 Wn. App. 732 (Div. III, 1995) Sept. '95:12

## WITNESS INSTRUCTIONS

Prosecutor may not instruct witnesses not to speak with defense attorney in prosecutor's absence -- may only advise as to rights. State v. Hofstetter, 75 Wn. App. 390 (Div. II, 1994) March '95:17

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### **BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

**(1) DEFENDANT WHO FLED STATE FOLLOWING HIS CONVICTION WAIVED HIS RIGHT TO APPEAL** -- In State v. Estrada, 78 Wn. App. 381 (Div. III, 1995) Division Three of the Court of Appeals rules that a defendant waived his right to file an appeal when he fled the state following his conviction (for vehicular homicide) but before judgment and sentence were entered.

The Court of Appeals agrees with the prosecutor that the precedent of State v. Johnson, 105 Wn.2d 92 (1986) -- holding that one who flees the court's jurisdiction while an appeal is pending waives the right to file an appeal -- applies equally to the situation where one flees the court's jurisdiction following conviction but before an appeal has been filed.

Result: 1984 Grant County Superior conviction for vehicular homicide affirmed.

**(2) DEFENDANT LOSES MIRANDA CHALLENGE AND 9.73 CHALLENGE TO ADMISSION OF TAPE RECORDINGS OF POLICE BARRICADE NEGOTIATIONS** -- In State v. Pejsa, 75 Wn. App. 139 (Div. II, 1994) the Court of Appeals rejects defendant's challenges to the admission of police tape recordings of phone conversations. The tapes were made by police while they were attempting to talk Pejsa out of the apartment in which he had barricaded himself.

#### **(1) MIRANDA ISSUE**

Responding to defendant's argument that Miranda warnings should have been given to him by the police before they began talking to him, the Court of Appeals explains its ruling that the questioning in his case was not "custodial":

Generally, the police must warn a person of his or her Miranda rights before conducting a custodial interrogation. . . . The purpose of this requirement is to protect the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and from deceptive practices of interrogation. . . .

A suspect is "in custody" for Fifth Amendment and Miranda purposes as soon as his or her freedom of action is curtailed to a "degree associated with formal arrest". . . . The inquiry in this regard is how a reasonable person in the suspect's position would have understood his or her situation. . . .

Only a handful of cases have considered whether police questioning of a "barricaded person" constitutes "custodial interrogation". In Mesa [U.S. v. Mesa, 638 F.2d 582 (3rd Cir. 1980)], the defendant barricaded himself in a motel room and made several incriminating statements to an FBI agent over the phone. To determine whether there had been a "custodial interrogation", the court examined

the "precepts underlying the Miranda rule . . .". The court noted that the Miranda Court had been presented with cases involving "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights". The Mesa court noted that Miranda had been aimed at "in-custody" interrogations, because of

the secrecy involved, the fact that the interrogator was alone with the suspect and thus could employ any number of subtle psychological pressures, and the fact that the suspect's will was much more likely to be worn down when he was interrogated while alone in an atmosphere controlled by the police. Therefore, the key aspect of the custodial setting as described in Miranda is the isolation of the suspect in a room that is dominated by the law enforcement officials who will interrogate him. In this setting, the police have immediate control over the suspect -- they can restrain him and subject him to their questioning and apply whatever psychological techniques they think will be most effective.

Ultimately, the Mesa court held that a situation involving a "barricaded person" did not involve the same concerns as were present in Miranda. A barricaded person can prevent "law enforcement officials from exercising immediate control over his actions." A barricaded person can terminate his conversations with police simply by putting down the telephone. A barricaded person can control the direction of the conversation and is free to discuss anything he or she wants. Thus, the Mesa court held that "by barricading himself in his motel room with a gun, [and] successfully prevent[ing] the FBI from exercising any control over his immediate actions or forcing him to be subjected to their questioning, [the defendant] was not in custody with the meaning of Miranda. . . .

[W]e hold that there was no "custodial interrogation" here. Pejsa successfully had barricaded himself in the apartment in such a way as to prevent the police from exercising control over his actions. The police could not compel him to listen to their questions, much less subject him to the interviewing techniques or "tricks" that concerned the Miranda Court. **He was free to hang up the phone whenever he was tired of talking, and he did so on a number of occasions. He was not in the type of police-dominated atmosphere that existed in Miranda, and the police were not required to give the Miranda rights.**

[Some text and case citations omitted; Emphasis added by LED Editor]

## (2) PRIVACY STATUTE (9.73) ISSUE

Responding to defendant's argument that his rights under the electronic privacy statute were violated, the Court of Appeals explains its opinion that two statutory exceptions (the consent exception and the barricaded person exception) to the statutory all-party consent rule independently authorized the recordings:

Generally, RCW 9.73 prohibits the recording of any "private communication" or "private conversation" without the consent of *all* parties involved in the communication. "Consent" is

obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030(3).

RCW 9.73.030(2)(d) states an exception to the need for consent by all parties to a conversation. It provides in pertinent part:

[W]ire communications or conversations . . . which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, . . . may be recorded with the consent of one party to the conversation.

A "barricaded person" is

one who establishes a perimeter around an area from which others are excluded and either:

(i) Is committing or is immediately fleeing from the commission of a violent felony; or

(ii) Is threatening or has immediately prior threatened a violent felony or suicide . . .

RCW 70.85.100(2)(b).

Here, the police complied with RCW 9.73.030(3). On the tape itself, the following appears:

SWAT: . . . This is a closed line.

PEJSA: You're not recording it?

SWAT: I'm recording it.

PEJSA: Oh Okay.

Thus, the police announced they were recording, and Pejsa acknowledged his understanding of that fact.

In any event, the police did not need Pejsa's consent because of RCW 9.73.030(2)(d), the "barricaded person" exception. Pejsa was within that exception because he had "established a perimeter around an area from which others are excluded", and because he had committed or was threatening to commit a violent felony. For these reasons, the trial court did not err in admitting the audiotape.

[Some citations omitted]

Result: affirmance of Thurston County Superior Court convictions for two counts of first degree

burglary and one count each for first degree rape, first degree kidnapping, second degree possession of stolen property, and unlawful imprisonment; exceptional sentence of 300 months affirmed.

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### **TROOPER GINTER WINS POLICE CHALLENGE DRIVING COMPLETION**

State Patrol Trooper Don Ginter won the Police Challenge, an annual benefit driving competition conducted by the Boeing Company employees' auto sports club and the Northwest Region of the Sports Car Club of America. The event raises funds for the Benevolent Fund of Antonio Terry and promotes positive relations between motor sports enthusiasts and law enforcement personnel. Terry was a Seattle Police Department detective shot and killed last year by a motorist on an I-5 exit.

Don, command driving instructor at the WSP Academy, drove a 1994 Chevrolet borrowed from Trooper Ron Tuggle. Don competed against law enforcement officers from the Seattle and Mercer Island Police Departments, King County, Pierce County, and 75 members of the SCCA.

Don Ginter has been teaching the Emergency Vehicle Operations Course (EVOC) for the Criminal Justice Training Commission's Basic Law Enforcement Academy recruits for 16 years. The Training Commission is most proud to have "the best" teaching for them!

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### **NEXT MONTH**

The January 1996 LED will address, among other recent appellate court decisions of interest, the Washington State Supreme Court decisions in: (1) State v. Trevino ( with (A) GOOD NEWS -- reversing on "no prejudice" grounds the BAC test suppression ruling of Division Three of the Court of Appeals and holding that BAC testing does not generally begin with the check of the arrestee's mouth; but (B) BAD NEWS-- reading the court rule on "right to counsel", CrRLJ 3.1(c)(1), in a fashion that could prove problematic in future cases where police do not, soon after making an arrest, advise arrestees of their right to counsel); and (2) State v. Carter (addressing the recurrent "exclusionary rule" question of whether defendants have "automatic standing" to challenge police searches and seizures under an "independent grounds" reading of the Washington constitution's article 1, section 7; the Court answers the question qualifiedly in favor of automatic standing, but the Court once again appears to have left room for debate in future cases raising this issue).

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.